NO. 34464-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MAURICE SAUVE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting statements the appellant made to the arresting officer without first affording the appellant the benefit of a hearing pursuant to CrR 3.5.

2. The court erred in denying appellant's Motion for a New Trial.

3. The court erred in refusing to instruct the jury, with respect to the charge of burglary in the first degree, that appellant had no duty to retreat.

4. The court erred in denying appellant's motion to strike the irrelevant testimony of Arlene Stiles where the appellants were denied the opportunity to cross examine Stiles.

5. The court erred in entering the judgment and sentence.

6. The court erred in calculating appellant's offender score pursuant to the Sentencing Reform Act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it reversible error for the court to admit the testimony of the arresting officer

regarding statements appellant allegedly made without first holding a hearing pursuant to CrR 3.5 to determine the admissibility of the statements?

2. Did the court err in denying appellant's Motion for a New Trial based on newly discovered evidence where that evidence was material, could not have been discovered before trial, and would have changed the outcome of the trial?

3. Did the court err when it refused to instruct the jury with respect to the burglary charge that appellant had no duty to retreat when appellant's theory at trial was that he was invited into the home of the complaining witnesses to purchase drugs from them and while inside they attacked him?

4. Was it a violation of appellant's constitutional rights to cross examine and confront adverse witnesses when the court refused to strike the testimony of Arlene Stiles despite the fact that her testimony was irrelevant, vouched for the character of the complaining witnesses and was not subject to effective and relevant cross examination because she claimed a privilege?

5. Did the court err by entering a judgment and sentence?

6. Did the court err in calculating appellant's offender score as 9 where the court calculated two of appellant's pre-1986 prior convictions separately despite the fact the sentences in both were expressly ordered by the trial courts to be served concurrently with each other?

C. STATEMENT OF THE CASE[1]

1. Procedural Facts

On July 29, 1993, Maurice Sauve Jr., appellant herein, was charged by information filed in King County Superior Court with one count of burglary in the first degree and two counts of robbery in the first degree. RCW 9A.52.020; RCW 9A.56.020(1)(b); RCW 9A.56.190. In all counts it was alleged that

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[1] This brief refers to the report of proceedings as follows: 1RP - October 4-5, 1993; 2RP - October 6, 1993; 3RP - October 7, 1993; 4RP - October 12, 1993; 5RP - October 13, 1993; 6RP - October 13, 1993; 7RP - October 14, 1993; 8RP - October 15, 1993. The sentencing hearings are referred to by date.

Sauve was armed with a deadly weapon. Supp. CP ___ (information, filed 7/29/93).[2]

A jury trial was held on October 4, 1993, the Honorable Michael J. Fox presiding. Sauve was tried with co-defendants James Blair and James Morelli, Jr. Sauve was found guilty as charged and guilty of being armed with a deadly weapon with respect to all counts. CP 1-2.

Sauve was sentenced to 134 months on the burglary count and 195 months each of the two robbery counts. The sentences included the deadly weapon enhancements and were ordered to be served concurrently. CP 46-51. The sentences were based on an offender score of 9. CP 46-51.

This timely appeal follows.

2. Substantive Facts - State's Case

Dawn Shafer testified that on July 23, 1993, shortly after 8:00 p.m., she parked her car in front of the Renton apartment she shared with her husband James Tremlin. 2RP 87-92. She had been

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[2] There were substantial problems in locating and designating the clerk's papers in the present case. Apparently, prior to current appellate counsel's appointment, much of the superior court file was misplaced.

grocery shopping and as she was removing her grocery bags from the car she was approached by three men who she identified as Sauve, Morelli and Blair. 2RP 92-93.

Shafer testified the three men surrounded her and asked if she lived in apartment 102. When she replied that she did not live in that apartment, Sauve told her they were the police and they wanted to talk to her. 2RP 93. Shafer then asked to see some identification and Sauve pulled out a gun and told her they wanted to go "inside". 2RP 94.

Tremlin testified that he and his friend, Ted Bjoring, were in the apartment packing because Tremlin and Shafer were preparing to move. 4RP 121-22. Tremlin testified that when he looked out the widow he saw Shafer surrounded by three men. 4RP 123. Tremlin stated he saw Sauve holding a gun so Tremlin grabbed his M-1 carbine rifle, loaded it, and went to the front door. 4RP 124-25. As Shafer and the three men approached the front door Shafer said, "Jim these are police". 4RP 125. Tremlin put his rifle on an ironing board near the

door and Shafer and the three men entered the apartment. 4RP 125-26.

Shafer testified that after they entered the apartment, Sauve told her to sit in a chair and he told Bjoring and Tremlin to lie on the floor. 2RP 97. Sauve ordered Tremlin to lay on his back, with his hands behind him, and ordered Bjoring on his stomach. According to Shafer, Sauve pulled out a set of handcuffs and waved them at Tremlin. 2RP 98. However, Tremlin and Bjoring did not testify that they saw any handcuffs.

According to Tremlin, Sauve asked him where the money and "done" were. 4RP 128-29. "Done" is a slang term for methadone; both Tremlin and Shafer testified that they used methadone and they were in a "carry" program which allowed them to take methadone home from the treatment center. 2RP 104; 3RP 54; 4RP 128. Shafer testified that in the past she has used both methadone and heroin at the same time, however she denied she and husband ever sold the drugs. 3RP 31, 56. Shafer also denied that there were a lot of frequent short term visitors at their apartment. 3RP 32.

Tremlin testified that when Sauve asked if they had any "done," he told Sauve he did not and then asked to see some identification. 4RP 131. According to both Shafer and Tremlin, Sauve then opened the gun's cylinder, removed all but one bullet, and said "we are going to play a little Russian roulette here". 2RP 98; 4RP 131. Tremlin and Shafer testified that Sauve placed the gun against Tremlin's forehead and pulled the trigger. 2RP 99; 4RP 131. Tremlin then reached up, grabbed the gun and pushed it away and yelled at Bjoring to grab the gun. Tremlin and Sauve then began fighting with each other. 4RP 133.

Shafer's testimony was somewhat different than Tremlin's testimony. Shafer testified that while Sauve was pointing the gun at Tremlin, Morelli took about $140.00 from her purse and Blair was rummaging through the closets in the back of the apartment. 2RP 99. According to Shafer, Morelli also kept looking through the blinds out the front window. When Morelli separated the blinds, Shafer saw a Renton Police car drive by the apartment building. 2RP 100. Shafer testified she said the

"real" police are here. According to Shafer it was at this point that Tremlin said "O.K. Ted now" and the struggle between Tremlin and Sauve began. 2RP 101. Shafer was able to get around Morelli and she ran out the front door. 2RP 101.

Bjoring's testimony was different than Tremlin's testimony or Shafer's testimony. Bjoring testified that prior to Sauve pointing the gun at Tremlin's forehead, either Morelli or Blair ripped his wallet out of his pants and took $140.00 from the wallet. 3RP 143. Bjoring also testified that after Sauve placed the gun against Tremlin's forehead Sauve then placed the gun against Bjoring's head. Bjoring stated it was at that point he and Tremlin grabbed the gun. 3RP 145. Bjoring also testified that he did not use drugs, unlike Tremlin and Shafer who admitted they were on a methadone program. 4RP 41.

Tremlin testified that while he was struggling with Sauve for control of the gun, Blair hit him on the back of the head with a revolver. 4RP 133-34. Tremlin then attacked Blair and the two fought while Bjoring continued to fight with Sauve. 3RP

147; 4RP 135. According to Tremlin and Bjoring, the third man emerged from the back bedroom with a shotgun and hit Tremlin over the head. 3RP 148; 4RP 136. Blair then hit Bjoring over the head with a pistol and the other man hit Bjoring on the forehead with the shotgun. 3RP 148. Tremlin and Blair testified that Sauve then left the apartment trough the front door and Blair and the third man exited through the bedroom window. 3RP 149; 4RP 138.

Shafer, who had left as the fighting started, went to her landlord's apartment and asked someone to call 911. The apartment manager was in the parking lot and told her the police had already been called. 2RP 101. She and the apartment manager went back to her apartment and Morelli was standing at the doorway. Shafer said "that one of them" and Morelli said "what, I'm just a victim" and he left. 2RP 102.

Officer Robert Onishi of the Renton Police Department testified that he received a call concerning a possible fight in front of the apartment house where Shafer and Tremlin lived. When

Onishi drove up to the apartment he saw Tremlin, Bjoring and Shafer running towards his car. 4RP 75-77. Tremlin and Bjoring were bleeding from the head and Shafer was screaming. After talking to them, Onishi ran along the apartment building and saw Sauve through the fence, taking off some gloves. 4RP 77-81. Onishi arrested and searched Sauve. During the search Onishi found a small revolver holster and a handcuff case. 4RP 82-84. Later, Onishi found a coat and inside the coat were five .38 caliber bullets and a pair of gloves. 4RP 87. Onishi admitted on cross examination that Sauve had facial lacerations. 4RP 117.

Officer Steve Gurr, a K-9 officer with the Tukwila Police Department, testified that he and his dog followed a track from outside the apartment to a nearby house. 5RP 51-70. There, Gurr found Morelli under the house in a crawl space. Morelli told the officer he was out enjoying his yard. 5RP 72-73. Blair was also found under a crawl space and was bitten by the dog. 5RP 74, 76. In the crawl space police found a gold pocket watch which Tremlin identified as belonging to him, and two

bundles of money. 5RP 108-09. One bundle contained $141.00 and the other $140.00. Also found were receipts from Shafer's place of employment, gloves and a syringe. 5RP 108-10.

Blair was taken to the hospital. In the hospital Gurr was talking to another officer regarding whether the victims and defendants knew each other when Blair said something about "revenge". 5RP 80, 94, 101.

A subsequent search of the Tremlin and Shafer apartment uncovered three syringes, a rifle and a shotgun. 4RP 60-61. A Charter Arms pistol was also found in a flowerpot in a yard behind the apartment building and a revolver was found in the adjoining alley. 4RP 92-93, 110. Betty Campbell, of the Everett Police Department, testified that someone claiming to be Roxy Sauve reported a Charter Arms pistol was stolen from her home sometime in May, 1993. 6RP 7-11.

Arlene Stiles, director of the Western Clinic Health Services, testified on behalf of the state. She stated that the Clinic provides methadone to heroin addicts. 6RP 53-56. Stiles testified that

an addict whose urine analysis test have been clean for two months and who is working with the treatment program and has proven himself stable in "all aspects" of his life earns the privilege of being a "carry". 6RP 57-58. As a "carry" the person is allowed to take methadone home instead of receiving daily doses at the Clinic. 6RP 57-58.

On cross examination Stiles was asked whether Tremlin and Shafer were patients of the Clinic. Stiles refused to answer on the grounds that the information was confidential, citing the Code of Federal Regulations, 42 C.F.R. Part 2. 6RP 62, 64. The court would not allow the defendants to ask Stiles any questions about Tremlin or Shafer and denied defendants' motion to strike her testimony. 6RP 63-64.

3. Defense Case

Blair testified that he is a heroin addict. Blair met Tremlin and Shafer through a friend, Lori Cargel, and he had purchased heroin from Tremlin and Shafer on at least four or five separate occasions. 7RP 77-80. The protocol Blair followed was to phone Shafer's beeper and punch the number

17. Shafer would then call Blair back and they would arrange to meet to conduct a heroin purchase. 7RP 83. On the day of incident Blair followed that same procedure and Shafer called him back and told him she would be home sometime between 7:30 and 8:00 p.m. and he could come to the apartment at that time. 7RP 96.

Blair took his friends Morelli and Sauve with him and they went to Tremlin and Shafer's apartment. The three arrived at about 7:40 p.m. and waited in the parking lot until about 8:00 p.m. when Shafer drove up. 7RP 102-03. The three approached Shafer in the parking lot and she asked Blair if Morelli and Sauve were the police. 7RP 85-86. Blair assured her they were his friends. While they were talking, Tremlin walked onto the porch of the apartment with his rifle and asked Blair about the two men with him. 7RP 86-87. Blair told Tremlin they were friends. Tremlin then went back inside the apartment and laid the rifle down. 7RP 87.

Shafer, Blair, Morelli and Sauve then entered the apartment. Blair and Shafer went directly to

the back bedroom to consummate a heroin purchase while the others remained in the front living room with Tremlin and Bjoring. 7RP 87. Blair gave Shafer $185.00 for a gram of heroin and then prepared a "hit" of heroin for himself that he had brought with him. After injecting the heroin, Blair heard noises coming from the front room. 7RP 88.

Blair then went to the front room where he saw Tremlin and Bjoring holding Sauve against the wall and Tremlin was attempting to poke out Sauve's eyes. 7RP 88-89. In an attempt to protect Sauve, Blair grabbed a pistol from the ironing board and hit Tremlin on the head. 7RP 89, 93. Tremlin then threatened to kill Blair. Tremlin attacked Blair causing them both to fall into the kitchen where they began fighting. 7RP 89-90.

Blair was eventually able to break free from Tremlin and he directed Morelli to grab the money he had paid Shafer because Blair never did receive the heroin from her. 7RP 90. At that point Blair herd someone yell that the police had arrived so Blair ran out of the apartment because he did not

want to be arrested on a drug charge. 7RP 90-91. Blair ran to a nearby house and hid in the crawl space until the police dog bit his leg. 7RP 91.

Scott Fuller testified that he lived with his wife, Collette Fuller, in the apartment directly above the Tremlin and Shafer apartment. 7RP 28. On the night of the incident Fuller observed a group of people having what he described as a "heated discussion" outside the Shafer and Tremlin apartment. Both Shafer and Tremlin were a part of the group. Fuller stated as he was watching he saw two men shove each other. Fuller called 911. 7RP 12-16. Collette Fuller corroborated her husband's testimony. 7RP 61-69. Both stated they did not see anyone holding a gun nor did they see anyone holding Shafer. 7RP 16, 68.

Fuller also testified that he observed frequent visitors to the Tremlin and Shafer apartment. The visitors would arrive daily, at irregular hours, and would remain in the apartment for five to ten minutes, then leave. 7RP 19-22. According to Collette Fuller, a car with more than one person in it would often arrive at the Tremlin

and Shafer apartment, but only one person would go into the apartment and then for only a short period of time. 7RP 62. The Fullers suspected that drugs were being sold out of the apartment. 7RP 36-37.

Kelly Owens, another neighbor, also testified that she observed a number of short term visitors enter the Tremlin and Shafer apartment. 7RP 41-43. Owens also said these visitors came at all times during the day and evening but the visitors would never stay long. 7RP 46.

Loreen (Lori) Cargel, the woman who Blair testified introduced him to Tremlin and Shafer and who accompanied him on a number of occasions when he purchased drugs from Tremlin and Shafer, invoked her Fifth Amendment privileges when asked about her relationship with Blair, Tremlin, Shafer and the purchase of heroin. 6RP 153-57. The court granted the defendant's motion to compel Jody Morris, a paralegal with the prosecuting attorney's office, to testify regarding what Cargel said at a pretrial interview attended by herself, the prosecuting attorney and defense counsel. 7RP 6-7, 122-24.

Morris testified that as part of her duties with the prosecuting attorney's office, she took notes of the interview with Cargel. 7RP 137-38. Cargel stated in the interview that she had purchased heroin over 50 times from Tremlin and Shafer. 7RP 139-40. On some occasions she purchased the heroin from Shafer at or near Shafer's place of employment and at other times she purchased the heroin at the Tremlin and Shafer apartment. 7RP 140. Cargel verified that she introduced Blair to Tremlin and Shafer and that she had gone to their apartment with Blair on at least three occasions for the purpose of purchasing heroin. 7RP 146-47.

Morris stated she did not take verbatim notes of the Cargel interview and Morris could not remember such things as the description of the apartment where Cargel said she purchased heroin from Tremlin and Shafer or whether the pager number she used to contact Tremlin and Shafer was Tremlin's number or Shafer's number. 7RP 140-41, 144. Morris did state, however, that Cargel knew Shafer and Tremlin were in a methadone program and

she knew where Shafer worked and her position. 7RP 148-49.

4. Motion for Mistrial

Prior to trial a CrR 3.5 hearing was held with respect to statements made by the defendants. Supp. CP ___ (sub no. 57A, Cert. Pursuant to CrR 3.5). Officer Onishi testified at the hearing that Sauve declined to make a statement. 1RP 67. At trial the state elicited testimony from Officer Onishi that when Onishi stopped Sauve, he told Onishi that he was the victim of the assault and he was the person who had been assaulted. 4RP 82. Sauve objected to the testimony on the grounds that there was never a CrR 3.5 hearing with respect to the alleged statement. The court overruled the objection. Sauve then moved for a mistrial on the same grounds. 4RP 103-08; 7RP 202-04. The motion was denied.

5. Motion for a new Trial

After the trial and prior to sentencing, Sauve moved for a new trial on the basis of newly discovered evidence. Supp. CP ___ (Motion to Vacate Judgment; supporting documents); RP 1-6 (1/19/94).

In support of the motion Sauve presented the declarations of Lori Cargel, Rod Hill, Bill Arrowood and the deposition of Edward Garcia. Supp. CP ___ (Attached hereto as Appendices A, B, C and D, respectively). The motion was denied. RP 6 (1/19/94).

Cargel was originally called as witness for the defense. It was anticipated that she would testify that she bought heroin from Tremlin on at least 50 occasions during the months of May, June, and July, 1993. 6RP 111. It was also anticipated that she would testify that she introduced the co-defendant, Blair, to Tremlin. 6RP 112. Out of the presence of the jury, Cargel was questioned with respect to her anticipated testimony and she invoked her Fifth Amendment right against self-incrimination. 6RP 152-57. The court found that Cargel was therefore unavailable. 6RP 157.

In her affidavit in support of the new trial motion, Cargel stated that she met Tremlin and Shafer through an acquaintance and that she bought drugs from them from March 1993 through July, 1993. She indicated that three days before the incident,

she purchased heroin from Tremlin and at that time introduced Tremlin and Blair. She stated that she had cleared it through Tremlin that Blair would be allowed to buy heroin from him. Appendix A.

Five days after the incident she again met with Tremlin and Shafer to buy some heroin. Tremlin threatened her with a gun and indicated he was going find a way to make her pay for what had happened. For the next three to four weeks Tremlin called and harassed Cargel. Cargel then received a call from Blair's attorney who asked her if she would testify at the trial. After talking to Blair's attorney she received a call from someone claiming to be with the prosecuting attorney's office who called her names and who told her that if she testified at trial she would go to prison. Appendix A.

Cargel indicated she was prepared to testify when the court appointed her an attorney. Her attorney told her to "plead the fifth" when asked any questions. Appendix A.

Rod Hill stated that he is recovering heroin addict and that he attends the Federal Way

methadone clinic. He stated he has seen Bjoring for at least a year as a patient at the clinic. Appendix B.

Garcia stated that he once lived with Tremlin and Shafer and as late as February 1993, they were selling and consuming heroin. Appendix D.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MADE BY SAUVE WITHOUT FIRST HOLDING A HEARING PURSUANT TO CrR 3.5 TO DETERMINE ADMISSIBILITY.

Under CrR 3.5, when the statement of an accused is offered in evidence, the court is required to hold a hearing to determine whether the statement is admissible. CrR 3.5(a). Moreover, the court must inform the defendant he has the right to testify at the hearing without waiving his right to remain silent at the trial and that his testimony at the hearing will not be mentioned to the jury. CrR 3.5(b). The court must also enter written findings. CrR 3.5(c).

A CrR 3.5 hearing is mandatory. State v. Meyers, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976); State v. Taplin, 66 Wn.2d 419, 404 P.2d 469 (1965);

State v. Alexander, 55 Wn.2d 102, 105, 776 P.2d 984 (1989); State v. Tim S., 41 Wn. App. 60, 63, 701 P.2d 1120 (1985). The purpose of the hearing is to protect the constitutional rights of the defendant. State v. Tim S., 41 Wn. App. at 63.

Here, while there was CrR 3.5 hearing with respect to the statements Sauve made to Hornbuckle, Onishi testified at the hearing that Sauve made no statements to him. Then, during the state's examination of Onishi, Onishi stated Sauve told him that Sauve was the victim. 4RP 82. Onishi's trial testimony regarding the statement was in direct contradiction to his testimony at the hearing where he stated that Sauve indicated he did not wish to make a statement. 1RP 54-55; 4RP 82.

The court admitted this statement despite the fact that Sauve was not provided an opportunity to testify or present other evidence with respect to the alleged statement. In Tim S., the court ruled that the trial court's admission of statements made by the defendant without affording the defendant an opportunity to testify at a CrR 3.5 hearing regarding those statements violated his constitutional

rights. The court held the appropriate remedy was a retrial. Tim S., 41 Wn. App. at 63-64.

Here, as in the case of Tim S., Sauve was not given the opportunity to testify regarding the statement he allegedly made to Onishi. The court erred in refusing to grant Sauve's motion or to declare a mistrial. This Court should therefore reverse the convictions and remand this case for retrial.

2. THE TRIAL COURT ERRED IN REFUSING TO GRANT SAUVE'S MOTION FOR A NEW TRIAL WHERE NEWLY DISCOVERED EVIDENCE WARRANTED GRANTING THE MOTION.

Sauve made a motion for a new trial based upon the discovery of Hill, Arrowood and Garcia and the information provided by Cargel. RP 1-8 (1/19/94); Supp. CP. The trial court denied the motion for new trial.

CrR 7.6(a)(3) provides:

> (a) Grounds for a New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> . . .
>
> (3) Newly discovered evidence material for the defendant, which he

> could not have discovered with reasonable diligence and produced at the trial[.]

Granting a new trial is appropriate when the new evidence:

> (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any of the five factors is grounds for the denial of a new trial or the reversal of the grant of a new trial.

State v. Jackman, 113 Wn.2d 772, 779, 783 P.2d 580 (1989).

A trial court's ruling on a new trial motion should be reversed when the trial court abuses its discretion. Lesser deference is owed a decision not to grant a new trial than a decision to grant a new trial. State v. Briggs, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989); State v. York, 41 Wn. App. 538, 543, 704 P.2d 1252 (1985).

a. The Newly Discovered Evidence was Material

The primary factual issue here was whether Sauve and the other defendants were at the Tremlin/Shafer residence to buy drugs when they were assaulted by Tremlin and Bjoring or, whether they went to the residence to rob Tremlin and Shafer. Moreover, Shafer, Tremlin and Bjoring all testified they did not sell drugs and did not use drugs other than the methadone they received from a clinic. The testimony of Garcia and Cargel clearly go to the heart of the issues. Both state that at the time of incident Tremlin and Shafer were selling and using heroin. Further, Cargel stated that she was the one who introduced co-defendant Blair to Tremlin and set it up so that Blair could buy drugs from Tremlin. This testimony supports the defense theory of the case and contradicts the state's theory.

b. The Newly Discovered Evidence Would Probably Change the Result of the Trial.

The newly discovered evidence, if believed, would change the result of the trial because it

supports the defense theory that Sauve and the others were invited into the residence to purchase drugs and not to rob Shafer and Tremlin. The evidence presents a substantial reason to disbelieve the testimony from Shafer, Bjoring, and Tremlin.

c. The Newly Discovered Evidence was Not Merely Cumulative or Impeaching.

"Because the standard is that evidence be not 'merely' cumulative, it will not be deemed cumulative simply because part of its content was discovered or duplicated by evidence produced at trial, so long as the testimony contains additional elements which contribute significantly to defendant's case." People v. Barber, 445 N.E.2d 1146, 1149 (Ohio App. 1982). When the issue is the credibility of one witness for each side, as it was in this case, evidence that corroborates or conflicts with one or the other of those witnesses cannot be considered "merely cumulative." United States v. Riley, 657 F.2d 1377 (8th Cir. 1981).

While some of the newly discovered evidence would clearly impeach Tremlin, Bjoring and Shafer, the main thrust of the evidence supports the defense theory. Further, the evidence supplied by Hill relates to the credibility of Bjoring, who testified he did not use drugs, and the evidence supplied by Cargel and Garcia relative to the credibility of Shafer and Tremlin, who testified they do not sell drugs.

d. The Evidence was not Discovered Until after the Trial and Could not have been Discovered Through Due Diligence.

The evidence supplied by Garcia was only discovered when Garcia overheard a conversation between Sauve and another inmate at the King County Jail. __RP ___; Appendix D. The evidence supplied by Cargel, although known to defense counsel prior to trial, was unavailable to him because at the time of trial she was advised by her attorney not to testify. Thus, the evidence was discovered after the trial was completed and could not have

been discovered through due diligence prior to trial.

The newly discovered evidence produced by Sauve satisfies the legal test for granting a new trial. The court erred in denying Sauve's motion for a new trial. His convictions should be reversed and the case remanded for a new trial.

3. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE CHARGE OF BURGLARY IN THE FIRST DEGREE THAT SAUVE HAD NO DUTY TO RETREAT.

The defense theory of the case was that Sauve and the other co-defendants were invited into the Tremlin/Shafer residence for the purpose of purchasing drugs. 7RP 156; 8RP 62-72. Once inside the residence, a fight ensued and Sauve was attacked by Tremlin and Bjoring. 7RP 88-89. Thus, with respect to the burglary charge, Sauve's theory was that he did not enter the residence unlawfully, because he was invited in. He did not remain unlawfully after the fight broke out because he had

the right to defend himself once he was attacked. 7RP 160.

Sauve requested the court to instruct the jury that he had no duty to retreat in the language of Washington Pattern Jury Instruction (WPIC) 16.08. 7RP 156. The court indicated that "some sort of instruction would be appropriate here, and in recognition of the defense". 7RP 163. However, the court finally ruled that it would give no such instruction and noted the defendants' exception to that ruling. 7RP 173-74. The court erred.

Each side in a case is entitled to have the trial court instruct the jury on its theory of the case if there is evidence to support that theory. State v. Benn, 120 Wn.2d 631, 645 P.2d 753, cert. denied, 126 L. Ed. 2d 331, 113 S. Ct. 382 (1993); State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case. State v. Kidd, 57 Wn. App. 95, 99, 786 P.2d

847, rev. denied, 115 Wn.2d 1010 (1990). A test of sufficiency of instructions is whether counsel "may satisfactorily argue his theory of the case." State v. Hardy, 44 Wn. App. 477, 722 P.2d 872 (1986).

The proposed instruction was the WPIC pattern instruction 16.08, which reads:

> It is lawful for a person who is in a place where that person has the right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

The proposed instruction is a correct statement of the law. See State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936); State v. Lewis, 6 Wn. App. 38, 40-42, 491 P.2d 1062 (1971). The defendant is entitled to such an instruction when there is evidence in the record to support it. In Allery, the defendant entered her home and encountered her estranged husband who

threatened to kill her. The Washington Supreme Court stated simply:

> Defendant testified that she was afraid and thought she was in danger when she entered her home and found her husband. She testified he threatened to kill her. Her testimony was sufficient to support the proposed instruction. The trial court erred in refusing to instruct the jury that defendant had no duty to retreat.

101 Wn.2d at 598.

The evidence to support the proposed instruction here was similarly straightforward. The defendants were invited into the residence to purchase drugs and while inside they were attacked. They fought the attackers and made their escape. Accordingly, where the evidence supported the instruction, the court erred by refusing it.

The failure to give the instruction was prejudicial because the jury was instructed that to convict the defendants of burglary in the first degree they had to find that the defendants either

entered or remained in the residence unlawfully and that in entering or while in the dwelling or in immediate flight therefrom they assaulted a person therein or were armed with a deadly weapon. CP 13-14, 24 (Instruction No. 10). The jury could have believed that the defendants were invited into the residence to buy drugs but that once the fight ensued, and the defendants grabbed Tremlin's gun, they were remaining unlawfully. The no duty to retreat instruction would have correctly explained to the jury that if the jury found defendants were lawfully in the residence the defendants had no duty to retreat if they were attached by Tremlin and Bjoring. However, without that instruction the jury was forced to conclude that once the fight ensued the defendants remained in the residence unlawfully. Sauve could point to no instruction to tell the jury that there was no duty to retreat, thus, he could not satisfactorily argue his theory of the case. A trial court's refusal to give an instruction which prevents the defendant from arguing his theory of the case is reversible error. State v. Jones, 95 Wn.2d 616, 628 P.2d 742 (1981).

Thus, Sauve's conviction for burglary in the first degree should be reversed and a new trial ordered on that charge.

4. STILES' TESTIMONY VIOLATED SAUVE'S RIGHT TO CROSS EXAMINATION AND RIGHT TO CONFRONTATION AND THE COURT ERRED IN DENYING THE MOTION TO STRIKE THE TESTIMONY.

Stiles testified that a patient in her treatment program could only earn the privilege to carry methadone if the patient proved he or she was stable in all aspects of his or her life and had two months of clean urinalysis. 6RP 57-58. When counsel for the defendants attempted to cross examine Stiles regarding Tremlin and Shafer's participation in the program, Stiles refused to answer, citing 42 C.F.R. Part 2. 6RP 64. She claimed that federal rule prohibited her from revealing the identity of anyone in the program as well as their records. 6RP 63-65.

Shafer and Tremlin had each testified that they were in a drug treatment program and were

allowed to carry methadone home. However, neither stated the program to which they were admitted.

The defendants moved to strike Stiles' testimony because they were unable to effectively cross examine her, and because her testimony, in conjunction with the testimony of Shafer and Tremlin, created the inference that Shafer and Tremlin did not use illegal drugs, had clean urinalysis tests and led stable lives. 6RP 100-101. The court admitted that Stiles' testimony "could be viewed as character testimony with regard to Mr. Tremlin and Ms. Shafer", but nonetheless refused to strike the testimony. 6RP 126.

In her closing argument the prosecuting attorney exploited the defendant's inability to cross examine Stiles and the inferences created by Stiles' testimony to argue that Tremlin and Shafer were on "carry status." She then stated, "Arlene Stiles told you how you earn that right, that you are randomly tested for drugs or urine analyses, and you have to have so many that come back clean,

and then you earn the privilege, a 'carry' privilege." 8RP 18.

The Sixth Amendment to the United States Constitution and Washington Constitution Art. 1, § 22, grant criminal defendants two separate rights: (1) the right to present testimony in one's defense, Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); and (2) the right to confront and cross examine adverse witnesses, Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). See also, State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976).

It is well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the state's case. State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980); State v. Peterson, 2 Wn. App. 464,

469 P.2d 980 (1970); State v. Tate, 2 Wn. App. 241, 469 P.2d 999 (1970).

The state's case hinged on the character and credibility of Tremlin and Shafer. However, the defendants were denied the right to cross examine Stiles regarding whether Tremlin and Shafer were patients in Stiles' treatment program and whether they had in fact earned the privilege to carry methadone. The defendants were denied the right to cross examination Stiles with respect to whether Tremlin and Shafer did have a history of clean urinalysis and what factors led the program to conclude they led stable lives.

Further, because Stiles was unable to testify whether Tremlin and Shafer were even patients of the program, and because there was no evidence that any other methadone program follows the same guidelines and procedures as Stiles' program, her testimony was also irrelevant.

The error in refusing to strike Stiles' testimony was not harmless. Sauve's theory was that Tremlin and Shafer were drug dealers and he and the co-defendants were invited to the Tremlin/Shafer residence to purchase heroin. That theory was supported by the testimony of Blair and Morris. In order to resolve the conflicting evidence, the jury was required to make a decision with respect to Tremlin's credibility and Shafer's credibility. Because Stiles' testimony created the inference, later exploited by the prosecuting attorney in closing argument, that Tremlin and Shafer were drug free and stable people therefore of good character, her irrelevant and untested testimony was extremely prejudicial to Sauve's theory of the case.

As noted by the trial court, the testimony was essentially character evidence showing that Tremlin and Shafer were led stable lives, free of illegal drugs and not the type of people that used or sold heroin. Yet, the defendants were unable to probe that evidence to determine its either its relevancy

or credibility. Thus, Sauve's right to cross examination and confrontation were violated with respect to this important witness and his convictions should be reversed.

5. THE TRIAL COURT ERRED IN CALCULATING SAUVE'S OFFENDER SCORE.

Sauve was sentenced to 195 months on each count of robbery in the first degree and 134 months on the count of burglary in the first degree. The sentences were ordered to run concurrently, and were based on an offender score of 9. CP 46-51.

The court calculated Sauve's offender score of 9 based on the following prior convictions:

1. December 30, 1971 guilty plea to one count of grand larceny, Snohomish County Cause No. 4858; Supp. CP ___ (attached as appendix E);

2. March 14, 1972 guilty plea to 2 counts of violation of the uniform substances act (VUCSA), King County Cause No. 57407; Supp. CP ___ (attached as appendix F).

> 3. June 23, 1975 guilty plea to one count grand larceny, one count forgery in the first degree and one count credit card forgery, King County Cause No. 72856; Supp. CP ___ (Order of Deferred Sentence attached as appendix G, and 1979 Judgment and Sentence attached as appendix H);
>
> 4. February 20, 1979 convictions for 11 counts of robbery in the first degree, 2 counts kidnapping in the first degree, one count assault in the second degree and 2 counts possession of stolen property in the second degree, King County Cause No. 86071; Supp. CP ___ (attached as Appendix I).

The trial court calculated the 1971 convictions, the 1972 VUCSA conviction, the 1975 convictions, and the February 20, 1979 convictions separately. The convictions under King County Cause No. 86071 yielded a score of 2 as they all occurred prior to 1986 and the robbery in the first degree yielded the highest offender score. RCW 9.94A.360(6)(c); RCW 9.94A.360(9). The guilty plea in Snohomish County Cause No. 4858 yielded a score of 1. The guilty plea in King County Cause No. 72856 yielded a score of 1. The guilty plea in King County Cause No. 57407 yielded a score of 1.

RCW 9.94A.360(9). Finally, the current offenses, consisting of 2 counts of robbery in the first degree and one count of burglary in the first degree, yielded a score of 4. RCW 9.94A.400; RP 11 (2/11/94).

On July 30, 1975, an order deferring imposition of sentencing was entered with respect to King County Cause No. 72856. On February 20, 1979 a judgment and sentence was entered in that same cause number and Sauve was sentenced to 15 years on one count and 20 years on the other two counts. The judgment and sentence were expressly ordered to run concurrently with the sentence imposed in King County Cause No. 86071. On that same day a judgment and sentence was entered in King county Cause No. 86071 sentencing Sauve to a life term. That sentence likewise was expressly ordered to run concurrently with King County Cause No. 72856.

At his sentencing hearing Sauve argued that because the sentencing in King County Cause Numbers

72856 and 86071 were imposed on the same day and expressly ordered to run concurrently with each other, they should be counted together and not as separate prior offenses. RP 5-7 (2/11/94). The court found that because Sauve was placed on a deferred sentence in 1975 with respect to King County Cause No. 72856, and the deferred sentence was revoked in 1979, and the subsequent sentence was ordered to run concurrently with King County Cause No. 86071, the two cause numbers should be counted separately. RP 13 (2/11/94). By failing to count these cause convictions as a single point, the trial court erred.

Under RCW 9.94A.360(6)(c) multiple prior convictions committed before July 1, 1986, are counted as one offense if served concurrently, with the conviction yielding the highest offender score being the one used in calculating the offender score. In State v. Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991), the Supreme Court held that if a latter sentence was imposed with specific reference to the first, the offenses were committed before

July 1, 1986, and the concurrent relationship of the offenses was judicially imposed, then the sentences must be determined to have been served concurrently under RCW 9.94A.360(6)(c). Roberts, 117 Wn.2d at 576.

In the case of In the Matter of the Personal Restraint of Sietz, 124 Wn.2d 645, 880 P.2d 34 (1994), the Supreme Court reiterated its holding in Roberts, and held that

> [a] revoked sentence for an offense committed before July 1, 1986, ordered by the superior court judge to be served concurrently with another offense committed before July 1, 1986, merges the offenses to establish an "adult conviction served concurrently" for purposes of RCW 9.94A.360(6)(c).

Sietz, 124 Wn.2d at 652. The facts in Sietz are almost identical to the case at bar. Sietz pled guilty to second degree theft in 1981 and received a deferred sentence. In 1983, Sietz was convicted of possession of stolen property and sentenced to a term of not more than 5 years. The day following that sentence his 1981 deferred sentence was

revoked and he was sentenced to a term of not more than 5 years and the judge ordered the sentence to be served concurrently with the 1983 conviction. 124 Wn.2d at 646-47. On these facts, the Supreme Court ruled the 1981 and 1983 convictions should have been counted as one offense not two. 124 Wn.2d at 649.

Here, Sauve received a deferred sentence in 1975 for his convictions in King County Cause No. 72856. In 1979, that sentence was revoked and he was sentenced to a term of 20 years. On the same day he received a sentence of life in King County Cause No. 86071. The judgment and sentence in both cause numbers expressly state each is to be served concurrently with the other. Thus, as in Sietz, both sentences reference the other, both were committed prior to July 1, 1986 and the concurrent relationship of the sentences was judicially imposed.

Under RCW 9.94A.360(6)(c) as interpreted by the Court in Roberts and Sietz, Sauve's 1975

conviction in King County Cause No's. 72856 and 86071 should have been counted as one offense and not separately. Thus, his proper offender score is 8 and not 9. The court erred in sentencing him pursuant to an offender score of 9. This Court should remand the case to the trial court for resentencing based on an offender score of 8.

E. CONCLUSION

For the reasons stated above, Sauve's convictions should be reversed because the court failed to hold a CrR 3.5 hearing prior to admitting statements Sauve allegedly made to police, the court failed to strike Stiles' prejudicial testimony even though Sauve was denied the right to meaningfully cross examine her, and the court failed to grant the motion for a new trial. Sauve's burglary in the first degree conviction also should be reversed because the court failed to instruct the jury that Sauve had no duty to retreat. Additionally, the case should be remanded to the trial court for a new sentencing hearing and

Sauve should be sentenced based on an offender score of 8.

DATED this _____ day of August, 2003.

Respectfully submitted,

NIELSEN & ACOSTA

_____

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